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Brief of Cunningham, Farrar, Jonas

Kruttschnitt & McCaleb for
Complainant (on mo.)
Supreme Court of the United States.

OCTOBER TERM, 1899.

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Original. No.

STATE OF LOUISIANA

vs.

STATE OF TEXAS ET ALS.

Brief for Complainant on Motion for Leave to File
Bill.

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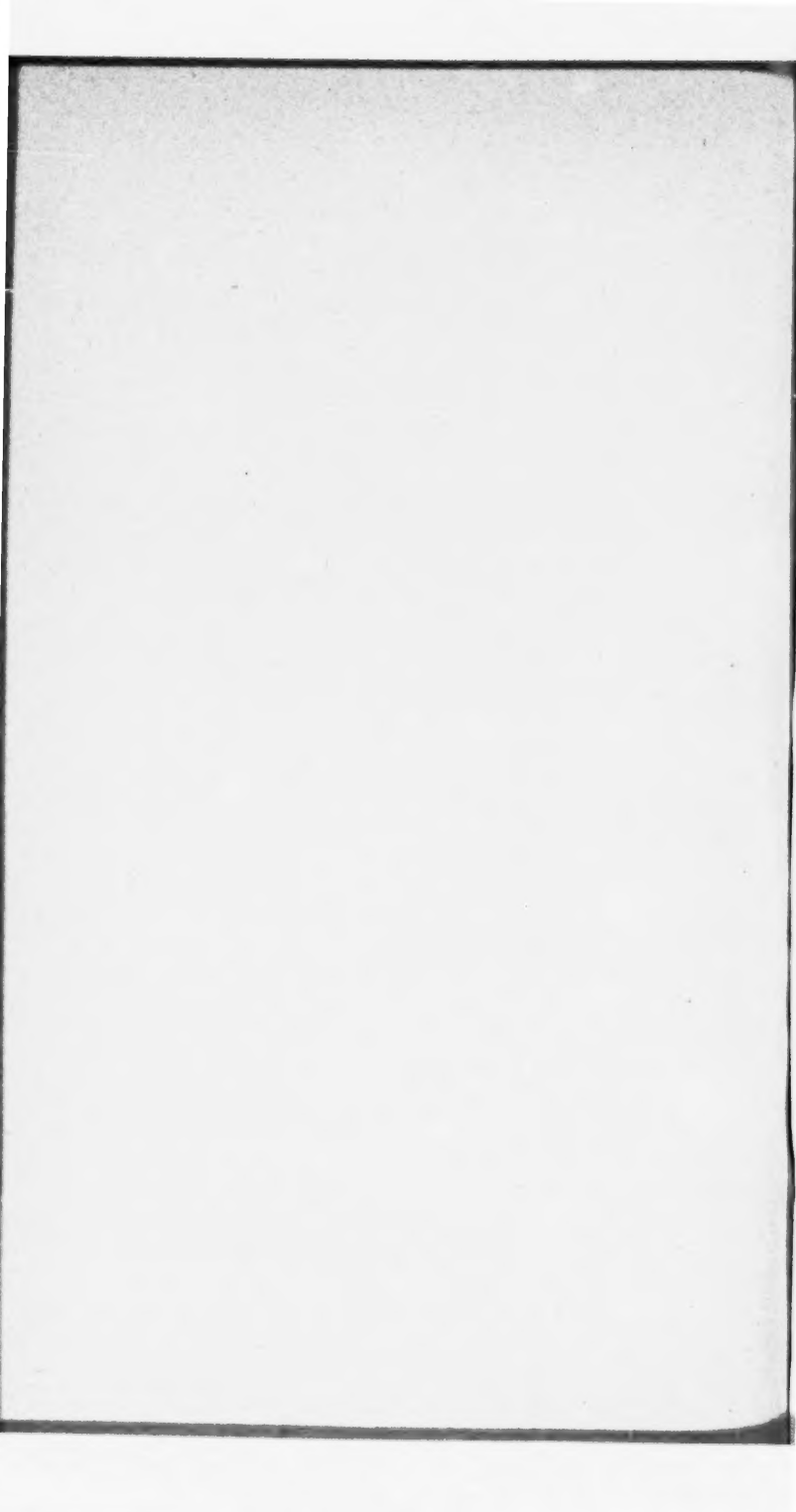
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I.

This bill is presented by the State of Louisiana against the State of Texas, Joseph D. Sayers, governor, and William F. Blunt, health officer.

The substance of its averments is that Blunt, the health officer, under the extensive powers granted him by the Texas statutes, did on September 1, 1899, with the consent of the governor, under the pretense of establishing a quarantine against yellow fever, lay an absolute embargo upon interstate commerce between the city of New Orleans—a city which contains more than one-fourth of the population

and contributes more than five-eighths of the revenue of the State of Louisiana—and the State of Texas; that this embargo is not levied in good faith to protect the health of the people of Texas, but to build up the commerce of her cities at the expense of the competitive interstate commerce between New Orleans and Texas; that this want of good faith appears in the fact that these same officers permit commerce at all times between Texas and the permanently infected ports of Mexico, Central and South America, and Cuba, and provide reasonable rules and regulations for the detention, inspection, and disinfection of the articles and vehicles of such commerce; that absolute prohibition of commercial intercourse is not necessary as a health measure, and that this fact is recognized as to their maritime quarantine by the Texas health authorities, by all other health officials, and by all persons acquainted with the principles of modern sanitary science; that a similar embargo was put on interstate commerce between New Orleans and other points in Louisiana and the State of Texas in 1897, in 1898, and for nine days in May, 1899; that it is the fixed policy and intention of the State of Texas and her officials to establish such an embargo whenever they have the slightest excuse, and to maintain them as long as they have a pretext; that such embargo is enforced by armed guards placed on all of the highways of commerce, acting under the authority of the State of Texas; that the effect of such embargoes is to destroy the interstate trade and commerce of the State of Louisiana and of her cities, ports, and citizens with the State of Texas, to impoverish her citizens, to reduce her taxable values, to diminish her revenues, to lessen the value of her public lands, to decrease immigration, and to deprive her citizens of their rights and privileges under the Constitution of the United States; that such embargoes are in violation of the Constitution of the United States, and particularly the

clause thereof granting the Congress exclusive power to regulate interstate commerce.

The prayer of the bill is for an injunction to restrain the particular embargo set up on September 1, 1899, and now in force, and to restrain all the defendants from hereafter, in accordance with their fixed and declared policy, from establishing or maintaining any such embargo, and for a decree adjudging that the State of Texas and her health officers have no such power to prohibit interstate commerce between the State of Louisiana and any part thereof and the State of Texas.

As the wrong is immediate and continuing, a preliminary injunction is asked for, and notice of intention to apply for such an order was given on October 8th to all the defendants.

II.

It is objected that this court is without jurisdiction of this cause.

Article III, section 1, of the Constitution of the United States declares:

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

Section 2 of the same article says:

"The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority; * * * to controversies between two or more States, between a State and citizens of another State, etc. * * * In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction."

As between the State of Louisiana and the State of Texas, this cause presents a "controversy between two States;" as

between the State of Louisiana and Joseph D. Sayers, governor, and William F. Blunt, health officer, both citizens of the State of Texas, it presents a controversy "between a State and citizens of another State." In either situation it is a case in which a "State is a party."

As regards the subject-matter, it is a case in equity arising under the Constitution and laws of the United States.

The State of Texas has granted autocratic and unlimited powers to her governor and health officer in the matter of quarantine.

Under the pretense of exercising such power, they have declared commercial war against the principal port of the State of Louisiana, the city of New Orleans, the second greatest exporting port of this continent. They have blocked every avenue of commerce with armed men, who board interstate trains and absolutely prevent the transmission of any article of merchandise or commerce coming from that city and bound for the State of Texas. They do not stop these articles of commerce for the purpose of inspection or purification. They prohibit their carriage, whether infected or not, whether capable of carrying infection or not.

The rights of thousands of the citizens of Louisiana are struck down by this action. Their trade and commerce is taken from them and transferred to rivals in the State of Texas. They and the State are materially injured thereby. They are impoverished; their property lessened in value; the volume of their business is diminished; they therefore pay less taxes and less licenses, which are calculated directly on their gross sales, and the revenues of the State are diminished. The restriction of business one way restricts it the other. Witness the enormous decrease in the cotton exports from Texas through New Orleans, averred in the bill as one of the consequences of this embargo.

In the second place, this embargo is a gross invasion of the constitutional privileges and immunities of her citizens guaranteed by article IV, section 2, of the Constitution of

the United States, giving them free ingress to and egress from the State of Texas and the enjoyment therein of the privileges of trade and commerce upon an equality with the citizens of Texas.

Where is the remedy for this? The State of Louisiana must have sovereignty enough left to protect her own revenues and the rights of her citizens. She cannot as a State of this Union make war on the State of Texas. She cannot act beyond her own borders. She cannot invade the State of Texas with armed men to protect her interstate commerce from forcible detention. She must appeal, and she has appealed, to that great tribunal established in the Constitution of the United States, with original and plenary jurisdiction to hear and determine "controversies between two or more States" and "between a State and citizens of another State."

The reasons for this jurisdiction are set forth in the Federalist, No. LXXX.

It must be as broad as the jurisdiction granted to Congress under the articles of confederation, which covered, "all disputes and differences now subsisting, or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any other cause whatever" (Art. X of Articles of Confederation). The clumsy tribunal provided for in that article to be set up by Congress to settle such controversies was dependent upon the will of Congress. If it should refuse to organize the tribunal, the controversy could not be settled. When the people drew together into the "more perfect union" of the Constitution this great function was entrusted to the Supreme Court of the United States, and was placed beyond the control or limitation of legislative authority.

This court ruled in *Rhode Island vs. Massachusetts*, 12 Peters, p. 719, that the original jurisdiction of the Supreme Court of the United States in a controversy between two

States was as broad as that given to Congress under the articles of confederation.

Speaking on this subject, the court said :

" If in this state of things it was deemed indispensable to create a special judicial power, for the sole and express purpose of finally settling all disputes concerning boundary, arise how they might, when this power was plenary, its judgment conclusive in the right, while the other powers delegated to Congress were mere shadowy forms, one conclusion is at least inevitable, that the Constitution, which emanated directly from the people, in conventions in the several States, could not have been intended to give to the judicial power a less extended jurisdiction, or less efficient means of final action, than the articles of confederation, adopted by the mere legislative power of the States, had given to a special tribunal appointed by Congress, whose members were the mere creatures and representatives of State legislatures, appointed by them, without any action by the people of the State. This court exists by a direct grant from the people of their judicial power; it is exercised by their authority, as their agent, selected by themselves for the purposes specified; the people of the States as they respectively became parties to the Constitution, gave to the judicial power of the United States jurisdiction over themselves, controversies between States, between citizens of the same or different States, claiming lands under conflicting grants within disputed territory."

Mr. Hamilton, discussing this jurisdiction in the *Federalist*, No. LXXX, said :

" It seems scarcely to admit of controversy, that the judiciary authority of the Union ought to extend to these several descriptions of cases: 1st, to all those which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation; 2d, to all those which concern the execution of the provisions expressly contained in the articles of union; 3d, to all those in which the United States are a party; 4th, to all those which involve the peace of the Confederacy, whether they relate to

the intercourse between the United States and foreign nations, or to that between the States themselves," etc.

* * * * *

"The power of determining causes between two States, between one State and the citizens of another, and between the citizens of different States, is perhaps not less essential to the peace of the Union than that which has just been examined. History gives us a horrid picture of the dissensions and private wars, which distracted and desolated Germany, prior to the institution of the *Imperial Chamber* by Maximilian, towards the close of the fifteenth century; and informs us at the same time, of the vast influence of that institution in appeasing the disorders and establishing the tranquillity of the Empire. This was a court invested with authority to decide finally all differences among the members of the Germanic body.

"A method of terminating territorial disputes between the States, under the authority of the Federal head, was not unattended to even in the imperfect system by which they have been hitherto held together.

"But there are other sources, besides interfering claims of boundary, from which bickerings and animosities may spring up among the members of the Union. To some of these we have been witnesses in the course of our past experience. It will readily be conjectured that I allude to the fraudulent laws which have been passed in too many of the States, and though the proposed Constitution establishes particular guards against the repetition of those instances which have heretofore made their appearance, yet it is warrantable to apprehend that the point which produced them will assume new shapes that could not be foreseen nor specifically provided against. Whatever practices may have a tendency to disturb the harmony of the States are proper objects of Federal superintendence and control."

The words "controversies between two or more States," used in the Constitution, cover every right of persons and property of a civil nature that can be made the subject of judicial cognizance.

In *Rhode Island vs. Massachusetts* (*supra*, p. 721) the court said:

"Though the Constitution does not in terms extend the judicial power to all controversies between two or more States, yet it in terms excludes none, whatever may be their nature or subject."

In *Osborne vs. Bank of the U. S.*, 9 Wheaton, 738, 821, the court said:

"Original jurisdiction, so far as the Constitution gives a rule, is coextensive with the judicial power. We find in the Constitution no prohibition to its exercise in every case in which the judicial power can be exercised."

The extent of the judicial power is as broad as all the other powers granted in the Constitution.

Chief Justice Marshall said in *Cohens vs. Virginia*, 6 Peters, p. 384, that if any proposition might be considered a political axiom, this might be considered one: "that the judicial power of every well-constituted government must be coextensive with the legislative, and must be capable of deciding every judicial question which grows out of the Constitution and laws."

Alexander Hamilton makes the same declaration in almost the same words in the number of the *Federalist* above quoted.

Equally broad and untrammelled is the grant of judicial power over "all cases in law and in equity" arising under the Constitution and the laws and treaties of the United States, whoever may be the parties thereto.

In *Cohens vs. Virginia*, 6 Peters, 382, Chief Justice Marshall said:

"The powers of the Union on the great subjects of war, peace, and commerce, and on many others, are in themselves limitations of the sovereignty of the States; but, in addition to these, the sovereignty of the States is surrendered in many instances where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on Congress than a conservative power to maintain the principles established in the Consti-

tution. The maintenance of these principles in their purity is certainly among the great duties of the Government. One of the instruments by which this duty may be peaceably performed is the judicial department. It is authorized to decide all cases of every description arising under the Constitution or laws of the United States. From this general grant of jurisdiction no exception is made of those cases in which a State may be a party. When we consider the situation of the Government of the Union and of a State in relation to each other; the nature of our Constitution; the subordination of the State governments to that Constitution; the great purpose for which jurisdiction over all cases arising under the Constitution and laws of the United States, is confided to the judicial department; are we at liberty to insert in this general grant, an exception of those cases in which a State may be a party? Will the spirit of the Constitution justify this attempt to control its words? We think it will not. We think a case arising under the Constitution or laws of the United States is cognizable in the courts of the Union, whoever may be the parties to that case."

It is now well settled that where a State is a party this court will not take jurisdiction in three classes of cases:

1. Where there is nothing but a political question involved.

Two cases illustrate this proposition: *State of Mississippi vs. Johnson*, 4 Wall., 476, and *State of Georgia vs. Stanton*, 6 Wall., p. 50.

The first case was a bill by the State of Mississippi against Andrew Johnson, President of the United States, seeking to restrain him, as President, from enforcing the acts of Congress known as the reconstruction laws. The court refused to entertain it because they "were fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties."

The second case was a bill by the State of Georgia against Stanton, Secretary of War; Grant, general of the U. S.

Army, and Pope, major general of the U. S. Army, to restrain the execution of the reconstruction acts, which had been passed over the President's veto. The court held that the case presented a political and not a judicial question, and that it had "no jurisdiction over the subject-matter presented in the bill."

The case of *Cherokee Nation vs. Ga.*, 5 Peters, p. 1, is sometimes quoted as a case involving a political question—*i. e.*, the right to restrain by injunction the execution of certain laws of the State of Georgia, but the court, having refused jurisdiction on the ground that the Cherokee nation was neither a State nor a foreign nation, expressed no opinion on the other question.

One of the justices in a separate opinion declared that the question presented was political; but Mr. Justice Thompson, with whom Mr. Justice Story concurred, discussed the whole case, and, disagreeing with the majority as to the status of the Cherokee nation, concluded that the case did not present a political question, and that the writ of injunction ought to issue.

The case of *Kentucky vs. Dennison*, 21 How., p. 65, is also sometimes referred to as a case where this court refused to take jurisdiction because the question presented was political, but a critical examination of it will not bear out this contention.

In that case the State of Kentucky applied for a mandamus on the governor of the State of Ohio, commanding him to cause Willis Lago, a fugitive from justice, to be delivered up to be removed to the State of Kentucky, having jurisdiction of the crime with which he was charged. Objection was made to the jurisdiction of the court and to its power to issue a writ of mandamus.

The court maintained its jurisdiction and held that mandamus was the proper remedy. It further held that it was the duty of the governor of Ohio to deliver up Lago, but it refused to issue the mandamus upon the sole ground

that "if the governor of Ohio refuses to discharge this duty there is no power delegated to the General Government, either through the judicial department or any other department, to use any coercive measures to compel him" (pp. 104-110).

The ground of this decision we do not believe would now prevail. It was rendered at a time when there was a widespread opinion in the United States, shared in even by the then President and the Chief Justice, who was the organ of the court, that the United States had no power to coerce a State. That question has been thoroughly settled by the power of the sword and by the acquiescence of those who ever questioned or doubted the power.

If the court had jurisdiction of the case, which it declared it had, and the writ of mandamus was the writ appropriate to the relief asked, and the court declared it was, and the duty to be enforced by the writ was one which the governor of Ohio was constitutionally bound to perform, and the court declared him to be so obligated, then it followed, as night follows day, that the court had the power to compel obedience to the writ.

Another case, which illustrates the point that a political is not a judicial question, is that of *Luther vs. Borden*, 7 How., p. —.

The court refused to decide which of two governments was the legal government in Rhode Island and upheld the acts of that government which had been recognized by the executive authority of the United States.

2d. Where the action is not a civil case, but one for the recovery of a penalty imposed by the municipal laws of the complaining State, which have of course no extraterritorial operation and which therefore the courts of no other sovereign will enforce.

This proposition is illustrated by the case of the State of Wisconsin *vs.* Pelican Ins. Co., 127 U. S., p. 265. In this case Mr. Justice Gray reviews all the cases theretofore decided by this court where a State was a party, and then said:

"The cases heretofore decided by this court in the exercise of its original jurisdiction have been referred to, *not as fixing the outermost limit of that jurisdiction*, but as showing that the jurisdiction has never been exercised or even invoked in any case resembling the case at bar."

3d. Where a State attempts to create a controversy between two States by pretended and collusive transfers to itself of the money demands of its own citizens against another State.

This proposition is illustrated by the two cases of New Hampshire *vs.* Louisiana and New York *vs.* Louisiana, argued, decided, and reported together in 108 U. S., p. 76.

In these cases the court said:

"No one can look at the pleadings and testimony in these cases without being satisfied beyond all doubt that they were in legal effect commenced and are now prosecuted solely by the owners of the bonds and coupons. In New Hampshire, before the attorney general is authorized to begin a suit, the owner of the bond must deposit with him a sum of money sufficient to pay all costs and expenses. No compromise can be effected except with the consent of the owner of the claim. No money of the State can be expended in the proceeding, but all expenses must be borne by the owner, who may associate with the attorney general such counsel as he chooses, the State being in no way responsible for fees. All moneys collected are to be kept by the attorney general, as special trustee, separate and apart from the other moneys of the State, and paid over by him to the owner of the claim, after deducting all expenses incurred not before that time paid by the owner. The bill, although signed by the attorney general, is also signed and was evidently drawn by the same counsel who prosecuted the suits for the bondholders of Louisiana, and it is manifest

in many ways that both the State and the attorney general are only nominal actors in the proceeding. The bondholder, whoever he may be, was the promoter and is the manager of the suit. He pays the expenses, is the only one authorized to conclude a compromise, and if any money is ever collected, it must be paid to him without even passing through the form of getting into the treasury of the State."

If individuals had been involved on both sides of such a transaction, it would doubtless have been characterized as a fraud on the jurisdiction of the court; but the dignified character of the States involved required that the matter should be expressed euphuistically, and jurisdiction was denied on the ground that "one State cannot create a controversy with another State, within the meaning of the term as used in the judicial clause of the Constitution, by assuming the prosecution of debts owing by another State to its citizens."

III.

A mere inspection of the bill in this case shows that it does not fall into any of the three categories above defined.

Its object is twofold: 1st. To protect from injury her own ports, commerce, lands, and revenues. 2d. To protect from injury the commerce of her citizens and their rights of trade and intercourse guaranteed by the Constitution of the United States.

Both of these classes of rights are injured by the unlawful obstruction of the highways of interstate commerce, which obstruction partakes of the nature of a common public nuisance.

These obstructions are established and maintained by the officials of the State of Texas, either with or without her consent, acting under the color of a law of that State. If they are acting with her consent and assistance, as averred in the bill, then she is a necessary party on this record. If

they are acting without her consent and authority, then she must disclaim and repudiate them and go hence, leaving the case to stand as one between the State of Louisiana and citizens of the State of Texas, usurping authority to block the highways of interstate commerce.

The power of the Federal Government to enforce the Constitution and to protect interstate commerce from all forms of unlawful obstruction resides in the judicial as well as in the executive and in the legislative branches.

In the celebrated *Debs* case, 158 U. S., p. 581, this court said :

"It is curious to note the fact that in a large proportion of the cases in respect to interstate commerce brought to this court the question presented was of the validity of State legislation in its bearings upon interstate commerce, and the uniform course of decision has been to declare that it is not within the competency of a State to legislate in such a manner as to obstruct interstate commerce. If a State with its recognized powers of sovereignty is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?

"As, under the Constitution, power over interstate commerce and the transportation of the mails is vested in the national Government, and Congress by virtue of such grant has assumed actual and direct control, it follows that the National Government may prevent any unlawfully and forcible interference therewith. But how shall this be accomplished? Doubtless it is within the competency of Congress to prescribe by legislation that any interference with these matters shall be offenses against the United States, and prosecuted and punished by indictment in the proper courts. But is that the only remedy? Have the vast interests of the nation in interstate commerce and in the transportation of the mails no other protection than lies in the possible punishment of those who interfere with it? To ask the question is to answer it. By article 3, section 2, clause 3, of the Federal Constitution it is provided :

“The trial of all crimes except in cases of impeachment shall be by jury; and such trial shall be held in the State where the said crime shall have been committed.”

“If all the inhabitants of a State, or even a great body of them, should combine to obstruct interstate commerce or the transportation of the mails, prosecutions for such offenses had in such a community would be doomed in advance to failure, and if the certainty of such failure was known, and the National Government had no other way to enforce the freedom of interstate commerce and the transportation of the mails than by prosecution and punishment for interference therewith, the whole interests of the nation in these respects would be at the absolute mercy of a portion of the inhabitants of that single State.

“But there is no such impotency in the National Government. The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all rights entrusted by the Constitution to its care. The strong arm of the National Government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation and all its militia are at the service of the nation to compel obedience to its laws.

“But, passing to the second question, is there no other alternative than the use of force on the part of the executive authorities whenever obstructions arise to the freedom of interstate commerce or the transportation of the mails? Is the army the only instrument by which the rights of the public can be enforced and the peace of the nation preserved?”

The court then goes on to show that the judicial power of the Government may be invoked.

In answer to the plea that the Government had no interest in such a suit, the court said:

“Neither can it be doubted that the Government has such an interest in the subject-matter as enables it to appear as party plaintiff in this suit. It is said that equity only interferes for the protection of property, and that the Government has no property interest. A sufficient reply is that

the United States have a property in the mails, the protection of which was one of the purposes of this bill. * * *

"We do not care to place our decision upon this ground alone. Every government entrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter."

The court then quotes the case of *U. S. ex. San Jacinto Tin Co.*, 125 U. S., 273, which was an action by the Government to annul a patent for land, and *The U. S. ex. Bell Telephone Co.*, 128 U. S., 315, which was an action by the Government to annul a patent for an invention, and proceeds:

"It is obvious from these decisions that while it is not the province of the Government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the nation, and concerning which the nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the Government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties."

The court then proceeds to demonstrate the following propositions:

1st. That interstate commerce by railroads is the same as interstate commerce by navigable rivers, both being highways of such commerce, the one artificial, the other natural, and that the fullness of control of Congress exists in the one case as in the other.

2d. That it lies within the governmental power to remove all obstructions and hinderances from such highways of commerce.

3d. That such hinderances and obstructions amount to a public nuisance.

4th. That one remedy is by bill in equity in a court of chancery for an injunction to remove or restrain such obstructions.

5th. That the jurisdiction of courts to interfere in such matters by injunction is one recognized from ancient times and by indubitable authority.

Under the doctrine of this case, the State of Louisiana in her corporate capacity would have the undoubted right to proceed in her own courts to remove any unlawful obstruction of or interference with the highways of her interstate commerce or with her interstate commerce itself. Does her right become any the less when the acts done are beyond her borders and are committed by State officials, either with or without the consent of a State? Has she not the right as a member of this Union to appeal to the courts of the Union to enforce the conditions of the covenant by which she and her people and all the other States and their people are indissolubly bound together? Does not this case present a modern instance of "the fraudulent laws" spoken of in the quotation, made above from the Federalist, as giving rise to a controversy between two States, tending to endanger the peace of the nation, such as the judicial power of the United States was established for the purpose of determining?

1st. So far as concerns the right of the State to sue in this court for an injunction to prevent an obstruction or interference with a highway of interstate commerce, tending

to injure her revenues, ports, and commerce, it is settled by authority.

In the case of *The State of Pennsylvania vs. The Wheeling Bridge Co.*, 13 Howard, this court enjoined the building of a bridge over the Ohio river fifty miles beyond the territory of Pennsylvania, being constructed under color of a statute of the State of Virginia.

The bridge was shown to be an obstruction to interstate commerce between the State of Pennsylvania and other States, and that such obstruction would tend to decrease the revenues of the State from certain highways of commerce constructed by the State of Pennsylvania within her own borders.

In *South Carolina vs. Georgia*, 93 U. S., p. 4, this court took jurisdiction of a bill filed by the State of South Carolina against the State of Georgia and others to enjoin them from obstructing the Savannah river, a highway of interstate commerce, on the ground that her interests and those of her citizens would be injuriously affected by such obstructions. The bill was dismissed because the works complained of were being prosecuted by the Federal Government.

In *Wisconsin vs. Duluth*, 96 U. S., 381, this court took jurisdiction of a bill filed by the State of Wisconsin against the city of Duluth, in Minnesota, to enjoin the obstruction and diversion of the waters of St. Louis river from their natural course, to the prejudice of the rights of the State of Wisconsin and of her citizens who had an interest in the continuance of the channel as an important highway for navigation and commerce in its natural and usual course.

The court dismissed the bill on its merits on the ground that the work sought to be enjoined had been authorized and inaugurated by the Congress under its lawful powers, who had appropriated public money to carry it out, and that therefore the court had no authority to prescribe the manner

in which the work should be conducted or to forbid its completion or to require the undoing of that which had been done.

On p. 382 the court says :

"Many very interesting questions have been argued, and ably argued, by counsel, which we have not found it necessary to decide. The counsel for defense deny that the State of Wisconsin has any such legal interest in the flow of waters in their natural course as authorizes her to maintain a suit for their diversion. It is argued that this court can take cognizance of no question which concerns alone the rights of a State in her political or sovereign character ; that to sustain the suit she must have some proprietary interest which is affected by the defendant. This question has been raised and discussed in almost every case brought before us by a State in virtue of the original jurisdiction of this court. We do not find it necessary to make any decision on the point as applicable to the case before us."

The averments of the bill in this case show proprietary interests affected in the same manner and to as great an extent as those in the Wheeling Bridge case.

But in the light of the Debs case, *supra*, all questions of proprietary interest in the sovereign who sues to enjoin an obstruction to interstate commerce are of no moment.

In that case Mr. Lyman Trumbull, counsel for Debs, attacked the jurisdiction of the court on the ground that the United States had no proprietary interest to protect. He said (p. 575):

"The Government does not own the railroads. It is a bill by the Government to prevent interference with the private property of the citizen lest such interference restrain commerce among the States."

We have quoted above the answer made by the court to this argument.

2d. If the State of Louisiana were an absolutely independent foreign sovereign, she would have the right to sue in the courts of the United States to restrain the unlawful acts of persons which if not prevented would damage the trade and property of its citizens.

This point is fully covered by the case of *The Emperor of Austria vs. Day & Kossuth* (3d De Gex, Fisher & Jones, p. 217).

The bill in that case was filed to restrain Kossuth, the Hungarian patriot, and Day, a printer employed by him, from printing or issuing certain paper money which purported to be issued by the Hungarian nation, and was declared on its face receivable in payment of all debts, dues, and taxes, public and private.

It did not purport to be a counterfeit of the lawful money of the Austrian Empire, but rather a substitute therefor, and exchangeable for the silver coin thereof.

The damage averred in that case was that this money, which was worthless, would deceive the people of Austria and Hungary, would go into circulation there, and would injure them in their trade and property.

The injunction asked for was issued and made perpetual.

In the case of the *Sapphire*, 11 Wall., 167, the court declared that "a foreign sovereign as well as any other foreign person who has a demand of a civil nature against any person here may prosecute it in our courts," and the above case of the Emperor of Austria was quoted as authority for the proposition.

The question then resolves itself into this: Has the State of Louisiana surrendered so much of her sovereignty as would prevent her, at least in a court of the United States, from suing to protect the trade rights and property rights of the mass of her citizens against the unlawful acts of another State or the citizens of another State? We concede that she might not have such authority in the courts

of a foreign nation, as the rights of her citizens in such foreign country are merged and drowned in their larger rights as citizens of the United States. As to all foreign nations and States, she can undoubtedly exercise no sovereignty, because she has surrendered all those powers to the Federal Government, and can have no contact with or controversy with them except by and through the Federal Government.

But, as regards the other States of this Union and the citizens of those other States, her right to sue them in every civil case at law and in equity in the great tribunal of the Federal sovereign is specially reserved, and is made one of the articles of the solemn covenant entered into by all the States and all the people thereof. In *Rhode Island vs. Massachusetts* (*supra*) this court said (p. 719):

"Those States, in their highest sovereign capacity, in the convention of the people thereof; on whom by the Revolution, the prerogative of the Crown, and the transcendent power of Parliament devolved, in a plenitude unimpaired by any act, and controllable by no authority (6 Wheaton, 651; 8th Wheaton, 584-'8), adopted the Constitution by which they respectively made to the United States a grant of judicial power over controversies between two or more States. By the Constitution it was ordained that this judicial power, in cases where a State was a party, should be exercised by this court as one of original jurisdiction. The States waived their exemption from judicial power (6 Wheaton, 378-380) as sovereigns by original and inherent right, by their own grant of its exercise over themselves in such cases, but which they would not grant to any inferior tribunal. By this grant this court has acquired jurisdiction over the parties in this cause by their own consent and delegated authority, as their agent for executing the judicial power of the United States in the cases specified."

And again, on page 743 :

"All the States have transferred the decision of their con-

troversies to this court; each had a right to demand of it the exercise of the power which they had made judicial by the confederation of 1781 and 1788, that we should do that which neither the States or Congress could do, settle the controversies between them."

And again, on page 744:

"In *Cohens vs. Virginia*, the court held that the judicial power of the United States must be capable of deciding any judicial question growing out of the constitution and laws; that in one class of cases the 'character of the parties is everything, the nature of the case nothing.' In the other 'the nature of the case is everything, the character of the parties nothing;' that the clause relating to cases in law or equity arising under the constitution, laws, and treaties, makes no exception in terms or regards 'the condition of the party.' If there be any exception, it is to be implied against the express words of the article. In the second class 'the jurisdiction depends entirely on the character of the parties,' comprehending 'controversies between two or more States.' 'If these be the parties it is entirely unimportant what may be the subject of controversy. BE IT WHAT IT MAY, THESE PARTIES HAVE A CONSTITUTIONAL RIGHT TO COME INTO THE COURTS OF THE UNION.'"

In every respect, except in so far as she has surrendered her sovereignty to the national sovereign, the State of Louisiana is a sovereign State.

This proposition has often been declared by this court.

Martin vs. Hunter's Lessee, 1 Wheaton, 325.

Buckner vs. Finley, 2 Peters, 590.

State of Rhode Island vs. Mass., 12 Peters, 719.

Ohio Life Ins. Co. vs. Debolt, 16 How., 428.

Doyle vs. Cont. Ins. Co., 94 U. S., 541.

Pennoyer vs. Neff, 95 U. S., 722.

Can it be possible that she has no power or right to appear in the courts of the nation to ask that the guarantees of the common bond of union be enforced, and that her citizens be protected by the Federal power in the exercise and enjoyment of Federal rights? We do not believe so and do not expect this court so to hold.

Respectfully submitted.

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Supreme Court of the United States.

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vs.

THE STATE OF TEXAS ET AL.

Supplemental Brief for Complainant on Plea to
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I.

The argument of the attorney general of Texas seems to maintain that this court has no jurisdiction of any controversy between two States except one of boundary.

The history of the genesis of the Constitution destroys this argument.

In the original draft of the Constitution, reported to the convention on August 6, 1787, by the "Committee of Detail," jurisdiction of boundary and territorial disputes between two or more States was given to a special tribunal to be organized by the Senate (art. IX, sec. 2) after the analogy

of the original articles of confederation ; and jurisdiction was given to the Supreme Court over " controversies between two or more States (except such as shall regard territory or jurisdiction)."

See Madison Papers in Supplement to Elliot's Debates, vol. 5 (ed. of 1876), p. 376.

The framers of the Constitution therefore considered that there were other controversies between States besides those of boundary and jurisdiction.

When this report was considered in detail by the body of the convention, this jurisdiction of the Senate was stricken out, on motion of Mr. Rutledge, on the ground that it " was rendered unnecessary by the national judiciary now to be established."

Ibidem, p. 471.

This motion and the reason given therefor necessarily required the limitative clause in the section defining the jurisdiction of the Supreme Court to be stricken out.

Accordingly, the report of the Committee on Style, presented September 12, 1787, five days before the Constitution was signed, fixed the jurisdiction of the Federal judiciary in the language in which it now stands in the Constitution.

Ibidem, p. 535.

Jurisdiction over the question of territory and boundaries therefor was superadded to the other grounds of jurisdiction of the Supreme Court in " controversies between two or more States."

No objection seems to have been raised at any time in the constitutional convention of 1787 to the grant of jurisdiction to the Supreme Court to controversies between States.

It did not present any novel feature in the new Government, because the special tribunals to be established by

Congress under the articles of confederation had since the foundation of the union between the States been vested with jurisdiction of "any * * * cause whatever" between them.

In none of the attacks made on the Constitution while it was pending before the people of the States for ratification was there a word directed against this clause.

Even Mr. Mason, who was a violent opponent of the Constitution in the Virginia convention, admitted that "the jurisdiction between States was right."

3d Elliot's Debates (old edition), p. 477.

In defending the Constitution in that convention, Mr. Madison said :

"The next case, where two or more States are the parties, *is not objected to*. Provision is made for this by the existing articles of confederation, and there can be no impropriety in referring such disputes to this tribunal."

Ibidem, p. 485.

Edmund Randolph (who refused to sign the constitution) in his letter to the Virginia house of delegates said :

"It follows too that the General Government ought to be the supreme *arbiter for adjusting every contention among the States*. In all their connections, therefore, with each other, and particularly in commerce, which will create the greatest discord, it ought to hold the reins."

Elliot's Debates (old edition), vol. 1, p. 523.

II.

The assistant attorney general admitted that any individual citizen of Louisiana might in the Federal court enjoin the Blunt embargo in his own behalf if he were thereby obstructed in his trade with Texas.

He further admitted that, under the doctrine of the Debs

case and *United States vs. Texas*, 143 U. S., the United States might file a bill in this court to enjoin the Blunt embargo.

But he denies the authority of the State of Louisiana, in a case where thousands of its citizens would have to sue to get relief, to come into the supreme tribunal of the nation and ask for an injunction.

Under this doctrine the State could never sue to abate a nuisance in any tribunal.

He says the "State is not quarantined in her corporate capacity."

Can a State in her corporate capacity smell a bad smell, or fall into pits dug in a highway, or bump its head on a low bridge over a highway, or be obstructed in floating down the channel of a navigable river?

He says further the whole State is not quarantined, but only the city of New Orleans, and that the only persons affected are those persons in the city of New Orleans engaged in interstate commerce.

At this point of the argument Mr. Justice Harlan put the significant question, "What would you say if your quarantine was directed against the whole State?"

No satisfactory answer was given to this question. The obvious point in the mind of the questioner was the elementary rule of logic that the whole includes all the parts. Seeing the conclusion to which he would be brought, counsel went off into the old fallacy of the "sorites," a favorite amusement of the Greek sophists, by which if one admits that one grain of wheat does not mean a pile of wheat, then by successive additions of a grain all the wheat in the world could be piled up together without its constituting a pile, because the difference between a pile and no pile would be a grain of wheat.

He asked the question if the State could sue if only one person was injured, and, having concluded that it could not, he then proceeded to add successive individuals to this incapacitating one, and asked the court where it was going to

draw the line, and how many persons less than all the persons in the State it would require to give the State an interest.

There is no case of public injury or nuisance where every person in the community is affected.

It is sufficient that the burden fall on those in the community, considerable in number, the line of whose lives or of whose business or personal rights or property interests brings them into contact with the thing complained of.

He then argued that while a State might bring a suit to vindicate the rights of the public in its own courts, it could not bring such an action in the courts of the United States for the reason that the wrongs complained of affected Federal rights, and that it had no power or authority to appeal in behalf of its citizens to the Federal power to protect those Federal rights.

He attempted to dispose of the authority of the case of *The Emperor of Austria vs. Day & Kossuth* by saying that the Emperor of Austria had an interest in all the money in his realm. Even if such a statement were true it would not dispose of the distinct statements made by the great judges who decided that case, that the sovereign had the right to stand in judgment to protect the trade and property interests of his citizens threatened with injury and damage by the acts of the defendants, and that such an action is not political in its nature.

We submit that at no time was any answer made to our argument that the State as *parens patriæ*, as an integral part and member of this Union, which was a tripartite covenant between the people, the States, and the Federal sovereign, created by the people and the States, could come into the tribunal of the Federal sovereign, established as a common arbiter between States, and ask that common arbiter to enforce the fundamental conditions of the covenant and to use the Federal power to restrain another State or its

officers, acting under the color of its laws, from violating those fundamental conditions.

He made no answer to our claim that the conduct of the State of Texas fell exactly within the description of the controversies arising out of "fraudulent laws," declared by Hamilton, in the *Federalist*, to be within the jurisdiction committed to the Supreme Court over "controversies between two or more States."

Nor, as pertinent to this point, was any answer made to the question propounded by Mr. Justice White, which put the exact case involved in our bill :

"Whether if the State of Texas should pass a law saying that if one case of fever should occur in any foreign port, trade and commerce should thereafter go on between that port and Texas ports under reasonable rules of detention, inspection and fumigation, but that if one case of fever should occur in a Louisiana town or port all trade and commerce between such place and the State of Texas should be absolutely prohibited, the State of Louisiana could appeal to the Federal power to strike down this discrimination against the commerce of her citizens?"

The question before your honors in this case is one of the most profound moment to the commerce and the peace of the nation.

The quarantine power, as a branch of the police power, is one of the reserved powers of the States. The Federal Government has no quarantine power; it can only prevent the States in the exercise of their undoubted and unquestioned power of self-preservation from stepping beyond the sphere of honest health laws into the natural domain of the regulations of commerce.

The line of demarcation between that power which is honestly exercised and which necessarily "affects commerce" and that power which is dishonestly exercised and which regulates commerce may be difficult to draw in some cases, but no such difficulty can arise in the case at bar.

The whole subject of National Quarantine for which some persons are clamoring will be settled by the declaration of this court that no State and no part of a State exercising governmental authority has the power to make commercial war on the commerce of the citizens of another State, either by prohibitive or by grossly discriminative quarantine regulations, and that the State whose citizens are thus oppressed may appeal directly to this court for relief from such flagrant violations of the common bond of union between the people and the States.

Respectfully submitted.

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